

1 we don't think there is any factual dispute
2 about it. The dispute is over whether there
3 is an explanation for that different
4 treatment, other than affiliation. And that
5 is what I would like to turn to next in the
6 outline, which is the similarity between these
7 channels. Because as we understand Your
8 Honor's ruling in the *Wealth TV* case and the
9 FCC statements in that case in *MASN* showing
10 similarity and showing different treatment of
11 similarly situated channels is compelling
12 evidence of discrimination. And that is what
13 we have here, in terms of similarities between
14 Tennis Channel, Golf Channel, and Versus and
15 their different treatment.

16 JUDGE SIPPEL: Well before you get
17 to that narrow part, I am going to ask you
18 something of a broader nature. And that is,
19 there was I guess in your proposed findings,
20 I have got it noted here as around pages 58 or
21 so, the argument is that Comcast headquarters
22 enforces a policy of restricting Tennis

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1 Channel to the sports tier.

2 MR. SCHMIDT: Yes, Your Honor.

3 JUDGE SIPPEL: The policy, that is
4 kind of a company-wide marching order, if I
5 understand what policy means in a company.
6 And yet, the evidence showed that Tennis
7 Channel was carried more broadly in
8 approximately a hundred markets that Comcast
9 serves on Comcast.

10 MR. SCHMIDT: Yes, Your Honor.

11 JUDGE SIPPEL: Now that seems
12 inconsistent --

13 MR. SCHMIDT: What the evidence --

14 JUDGE SIPPEL: -- with the policy.

15 MR. SCHMIDT: What the evidence
16 showed was exactly what Your Honor said, that
17 there are systems. And Mr. Bond testified, as
18 I understood his testimony, that those are the
19 places where Comcast is driven, where it faces
20 competition and is driven by competition in
21 those markets to get broader carriage to
22 Tennis Channel.

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1 But we introduced two pieces of
2 evidence as to why those systems are the
3 extreme outlier, rather than the majority.
4 One is, back in 2005-2006 when we tried to
5 take Comcast up on their offer to go out and
6 get individual systems to provide broader
7 carriage to us, and the example we gave was in
8 San Francisco, the system expressed interest
9 and then the system told us headquarters
10 overruled us.

11 So that was one piece of evidence.
12 We actually tried to do that and it wasn't
13 successful.

14 The other piece of evidence was
15 that Mr. Rigdon, and this is I think what we
16 cite for the policy point, Mr. Rigdon
17 testified that as the person now in charge of
18 determining what gets carried where, he is not
19 going to take Tennis Channel off the sports
20 tier. And he was clear, I thought, as to why
21 he said that. He said that because Tennis
22 Channel benefits Comcast on the sports tier in

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1 the same way that Golf Channel or Versus might
2 benefit Comcast on the sports tier but there
3 is just a different standard applied. When
4 they don't own the channel, they keep it on
5 the sports tier where they can make the extra
6 subscription money off of it. When they do
7 own the channel, they give it broader coverage
8 and pay it more money and don't relegate it to
9 the sports tier.

10 So that is what we were talking
11 about when we cited the policy.

12 Your Honor is absolutely right.
13 There are systems and Mr. Bond spoke to those
14 systems, as I understood his testimony, being
15 driven by competition. But they are the
16 outlier and the testimony showed why they were
17 the outlier in terms of what happened with San
18 Francisco and what Mr. Rigdon said on the
19 stand.

20 JUDGE SIPPEL: Is Rigdon Mr.
21 Bond's replacement?

22 MR. SCHMIDT: Yes, sir.

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1 JUDGE SIPPEL: So he is going to
2 go along with this. And does he intend to --
3 Now again, I am talking about a hundred
4 markets in which the Tennis Channel is put on
5 a broader platform. Is he going to overrule
6 those local channels and whatever they are
7 local market deciders and put it up on the
8 high tier, on the sports tier?

9 MR. SCHMIDT: No, I don't think --
10 We hope he is not and we didn't hear any
11 evidence that he will. I think what we
12 understood his testimony to be is just as to
13 new systems. The hundred systems are a tiny
14 minority of Comcast systems.

15 JUDGE SIPPEL: Well they are
16 individual markets, aren't they? You are
17 calling them systems.

18 MR. SCHMIDT: They are absolutely
19 individual markets, yes.

20 JUDGE SIPPEL: And they are good
21 markets. They must be because there is
22 competition there that you want to meet with

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1 the Tennis Channel programming.

2 MR. SCHMIDT: Yes.

3 JUDGE SIPPEL: I'm sorry, not you.

4 They want to meet, Comcast wants to meet.

5 MR. SCHMIDT: We are very happy to
6 get that carriage in those markets. Our
7 objection is that those are the vast outlier.
8 And that the argument is we should have to go
9 market-by-market to the thousands of markets
10 that exist and justify in each market broader
11 carriage, when we have shown in the past that
12 hasn't worked because of what headquarters has
13 done and the Comcast don't have to do that.

14 In the case of the Comcast
15 channels, headquarters says to the local
16 markets, you have to pay what we set for
17 Versus. You have to pay what we set for Golf
18 Channel. You have no choice in the matter.
19 That is the essence of our discrimination
20 claim and it hinges, ultimately on the
21 similarity between those channels and --

22 JUDGE SIPPEL: Well get to your

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1 similarities.

2 MR. SCHMIDT: Yes, I would like to
3 talk for a moment about similarity, Your
4 Honor.

5 We introduced a range of evidence
6 on the similarity between the channels that
7 spoke to the fact that they operate in the
8 same genre. They are sports channels. There
9 has even been some competition for
10 programming. The fact that they compete for
11 advertisers, the fact that they share,
12 demographics, and compete for an audience.
13 But what we found most compelling on this
14 point are statements about similarity that
15 appeared in Comcast's own documents and in
16 Comcast's own testimony where Comcast
17 recognized the similarity between its channels
18 and our channels. And that included
19 recognizing the similarity at the highest
20 levels when Tennis Channel presented the MFN
21 offer to Comcast that Your Honor spoke about
22 a few minutes ago. The comparable, the comp,

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1 and this is from a Comcast document that
2 Comcast looked at to try to value Tennis
3 Channel, was Golf Channel and Versus.

4 When Versus talks internally about
5 what it views as competitive sports networks,
6 Versus cites Tennis Channel as one of those
7 competitive sports networks. And that is true
8 right down the line in terms of the factors
9 that speak to similarity. They concede
10 similar demographics.

11 We showed the advertising overlap.
12 When they decided to value what Tennis
13 Channel's advertising was worth, they turned
14 to a Golf Channel executive to tell them how
15 to value Tennis Channel advertising. That
16 speaks to the overlap.

17 When their advertisers sell
18 advertising, the advertising that Comcast has
19 on their website, they compare Tennis and Golf
20 and their sales force is combined across their
21 sports channels, across Versus and Golf
22 Channel recognizing the similarities on

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1 advertising.

2 The same is true on other metrics.
3 We showed similar ratings between the networks
4 using a method that Comcast uses in its own
5 documents, this coverage area ratings that in
6 Comcast's own documents it uses to value its
7 networks. Mr. Brooks used that to show that
8 the networks are similar in terms of their
9 popularity and Mr. Bond conceded that ratings
10 matter to carriers. We know they matter to
11 advertisers. That wasn't a point of dispute.
12 Mr. Bond conceded that they matter to
13 carriers. And we showed similarity in terms
14 of the programming on the networks, where --

15 JUDGE SIPPEL: Well they would
16 want to know the same information even to
17 decide whether or not to take Tennis Channel
18 at all --

19 MR. SCHMIDT: Yes.

20 JUDGE SIPPEL: -- even on the
21 sports tier.

22 MR. SCHMIDT: Yes. Yes, and that

1 is a factor --

2 JUDGE SIPPEL: So the numbers are
3 very relevant. Okay, well, go ahead.

4 MR. SCHMIDT: Yes. They
5 absolutely are very relevant and that is a
6 factor that has been looked at in the
7 decisions in the *Wealth TV* case as -- I'm
8 sorry, in the *MASN* case as a means of
9 determining whether the channels are
10 equivalent, whether they enjoy similar
11 ratings. We show through Mr. Brooks that they
12 do enjoy similar ratings and Comcast certainly
13 criticized his method, even though he was
14 using a method Comcast uses in its own
15 documents. Comcast criticized that method but
16 they didn't come forward with any ratings
17 analysis of their own to show that they are
18 dissimilar. They have access to the most
19 sophisticated ratings information that exist
20 and they didn't refute Mr. Brooks' showing
21 with their own ratings analysis.

22 JUDGE SIPPEL: Well you are saying

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1 that the genre, which if I understand, that
2 means sports in general, --

3 MR. SCHMIDT: Yes, Your Honor.

4 JUDGE SIPPEL: -- that it falls
5 into that category.

6 MR. SCHMIDT: Yes.

7 JUDGE SIPPEL: It falls into the
8 overlap of advertiser interests.

9 MR. SCHMIDT: Yes, sir.

10 JUDGE SIPPEL: And you have got
11 statistics in the record on that.

12 MR. SCHMIDT: Yes.

13 JUDGE SIPPEL: What was the third
14 one again?

15 MR. SCHMIDT: The third one would
16 be ratings. The fourth one would be audience.

17 JUDGE SIPPEL: The ratings, yes.

18 MR. SCHMIDT: Yes.

19 JUDGE SIPPEL: And the fourth one
20 is?

21 MR. SCHMIDT: Audience. The
22 demographics of the audience.

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1 JUDGE SIPPEL: Oh, that is an
2 interesting one.

3 MR. SCHMIDT: A factor that was
4 very dissimilar in the *Wealth TV* case is very
5 similar here, including by their own
6 concessions where in their documents they
7 compare the Golf Channel audience to the
8 Tennis Channel audience, in terms of their
9 similar demographics.

10 Mr. Shell, in his deposition which
11 we put into evidence, kicked through the
12 programming on Versus and said hockey. That
13 is similar in demographics to tennis. College
14 football, that is similar in demographics.
15 Tour de France bicycle racing, that is similar
16 in demographics. So their own documents
17 concede the similarity in demographics between
18 the networks.

19 And then the final point is just,
20 we actually have --

21 JUDGE SIPPEL: I mean golf is
22 really such a different thing than tennis.

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1 Tennis is a one-on-one competition. It is a
2 real intense sport. Golf is kind of like well
3 you could kind of look at it like walking pool
4 or something. You hit the ball to get into
5 the hole and your worst enemy is yourself, not
6 your opponent. And then they talk about these
7 things because this opens the door to Freudian
8 examination.

9 (Laughter.)

10 JUDGE SIPPEL: And they have
11 panels of these guys. I mean, is that really
12 the same as what the tennis is all about?

13 MR. SCHMIDT: We think it is and
14 their own documents recognize that. They go
15 for the same advertisers. They --

16 JUDGE SIPPEL: Advertising, right.
17 You are on demographics now, though.

18 MR. SCHMIDT: They have the same
19 viewers in terms of who watches them. To be
20 sure, you can say one has 55 percent or 60
21 women, one has 65 or 70 percent women. There
22 is difference you can slice in the viewership.

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1 The question is, do they fall in the same
2 category for purposes of Section 616.

3 JUDGE SIPPEL: You can't slice too
4 narrow.

5 MR. SCHMIDT: You can't slice it
6 too narrowly. Exactly.

7 I was moved by the observation
8 Your Honor made very early in the case where
9 if you walk over to the tennis court, you turn
10 around and you walk 500 yards, you are the
11 golf course. They are similar sports in that
12 regard. They appeal to similar people. They
13 attract similar audiences.

14 JUDGE SIPPEL: Well in the old
15 days, they used to where a white uniform on
16 one and it is colors on the other but now even
17 that has changed.

18 MR. SCHMIDT: Yes.

19 JUDGE SIPPEL: Okay.

20 MR. SCHMIDT: But that would be
21 the level of dissimilarity, Your Honor.

22 Really in our view, the only

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1 compelling difference between the networks is
2 the cost, the fact that Versus and Golf
3 channel cost twice as much as Tennis channel.
4 But that is the difference that further cuts
5 in our favor.

6 We heard a lot of testimony during
7 the trial about how much extra it would cost
8 Comcast over the ten year course of the Tennis
9 Channel contract to provide equal carriage to
10 Tennis Channel. The fact is, it will pay
11 Versus and Golf Channel nearly a billion
12 dollars more over that time period for the
13 more favorable carriage that it gives them
14 than what it would cost to give that same
15 carriage to Tennis Channel. That is the level
16 of cost difference between the channels. And
17 that only further cuts in favor of the fact
18 that they are treating these channels
19 dissimilarly in a discriminatory way, the fact
20 that this is not a case where we come in at a
21 higher price demanding carriage at a higher
22 price. This is a case where we come in at

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1 half the price and where we even offered a
2 discount to try to obtain broader coverage
3 from Comcast.

4 JUDGE SIPPEL: Would you be
5 satisfied if you got relief in this case --

6 MR. SCHMIDT: With the discount?

7 JUDGE SIPPEL: -- going with the
8 discount price?

9 MR. SCHMIDT: We think we could
10 have come in and said we are the same, we
11 should get the same price. What we think we
12 should get is the price that is in the
13 agreement between the parties. The price that
14 is in the agreement --

15 JUDGE SIPPEL: The 2009 agreement?

16 MR. SCHMIDT: The 2005 agreement,
17 Your Honor.

18 JUDGE SIPPEL: The 2005 agreement.

19 MR. SCHMIDT: Yes, the 2005
20 agreement contemplated changes in carriage.
21 So it anticipated changes in carriage and it
22 left open the carriage terms, so that Comcast

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1 could make those changes in the interest of
2 fairness.

3 So that contemplates the fair
4 price. We think that is the measure of the
5 fair price. The fact that we went to Comcast
6 in 2009 and said we would like to do whatever
7 we can to try to work this out, we don't think
8 we should be punished for doing that by having
9 that lower price. That shows, we think, our
10 good faith in trying to resolve this, in
11 trying to work with Comcast to get broader
12 carriage. But --

13 JUDGE SIPPEL: So as far as you
14 are concerned, as far as Tennis Channel is
15 concerned, the 2009 discount is off the table.
16 Now you want what you consider to be the real
17 market. Is that right? You are looking for
18 a market price?

19 MR. SCHMIDT: The price in the
20 contract, Your Honor, in the 2005 contract.

21 JUDGE SIPPEL: All right.

22 MR. SCHMIDT: Which is a price, in

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1 terms of the market, that was actually set
2 before all of the improvements that I have
3 talked about and before Tennis Channel
4 received broader carriage in the market. If
5 anything, there is an argument that it is
6 below what the market would allow today.

7 JUDGE SIPPEL: Okay. Now before
8 you -- I mean, I think you have covered that
9 similarly situated.

10 MR. SCHMIDT: I have, Your Honor.

11 JUDGE SIPPEL: Okay. Let me then
12 ask you this question, as we have a lot to do
13 here.

14 Tennis Channel argues that -- Well
15 you are saying that there is a ripple effect -
16 -

17 MR. SCHMIDT: Yes, Your Honor.

18 JUDGE SIPPEL: -- that sends
19 Comcast restricted coverage out into the --
20 causes it to be adopted by other MVPDs. Is
21 that right?

22 MR. SCHMIDT: Yes.

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1 JUDGE SIPPEL: Do you want to
2 explain that a little bit better? A ripple
3 effect. That is like when you throw a rock in
4 a stream --

5 MR. SCHMIDT: Yes.

6 JUDGE SIPPEL: -- in a pool,
7 rather, a stagnant pool and it goes boop,
8 boop.

9 MR. SCHMIDT: Yes, except imagine
10 from the biggest rock imaginable in that pool
11 and that is Comcast.

12 JUDGE SIPPEL: Well that is a
13 splash.

14 MR. SCHMIDT: That is a splash.
15 That is not a ripple effect. That is what we
16 have seen here in several regards. And the
17 interesting thing about the term ripple effect
18 is it actually comes from Comcast documents.
19 It comes from Comcast, people on the
20 programming side in Comcast saying if Charter,
21 which is a company that is a quarter the size
22 of Comcast, if Charter doesn't give us broad

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1 coverage for Versus, that could have a ripple
2 effect in the marketplace. That could impair
3 our carriage in the marketplace.

4 They say that in a couple of
5 places. In another place, they say that in an
6 internal document and then Mr. Rigdon agreed
7 with that proposition that if you -- that the
8 marketplace looks at how channels get carried
9 and that in Comcast's words, this is Exhibit
10 38, Tennis Channel Exhibit 38 but is a Comcast
11 document, it is important to maintain high
12 penetration, expanded basic carriage for TGC
13 and Versus, that is The Golf Channel and
14 Versus, to signal to industry that these
15 networks are worthy of broad distribution.
16 That is the same document that uses the
17 "ripple effect" that Mr. Rigdon talked about
18 in his testimony and --

19 JUDGE SIPPEL: The other side of
20 that coin would be that, let's say and I will
21 pick one, bios or anything would say well you
22 are carrying your Golf Channel up on the

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1 sports channel, which gets lower distribution.

2 Why should I do it any different?

3 MR. SCHMIDT: Exactly. That's
4 exactly the challenge that we face when the
5 biggest carrier in the marketplace puts us on
6 the sports tier and refuses to take us off.
7 And where we are competing against channels,
8 and the evidence was uncontested on this, that
9 Comcast has always led the market in terms of
10 how favorably it carries Golf Channel and
11 Versus. When we are competing with channels
12 that get that advantage where Golf Channel and
13 Versus can go out to the marketplace and say
14 we get carried to 80 percent, 90 percent of
15 homes by Comcast in one of four markets, which
16 is what Comcast's footprint is, we get carried
17 to 80 or 90 percent of homes and we hear
18 statements like the one Your Honor said, which
19 is well Comcast is only carrying you at the
20 sports tier, that is a real challenge. And
21 that is why --

22 JUDGE SIPPEL: But isn't that

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1 really more of a business practice? The
2 decision is made -- Again, I am hypothesizing
3 somewhat. The decision is made to run Tennis
4 Channel and Versus -- I'm sorry -- Golf
5 Channel and Versus. And there is an
6 historical background to that, too. They go
7 back before Tennis Channel.

8 MR. SCHMIDT: Yes.

9 JUDGE SIPPEL: And the business
10 people say to themselves, well now look, if we
11 put this thing down, these programs or new
12 programs, if we put them on a high
13 distribution level, we have a better chance of
14 selling them at that broad level to other
15 competitors out there, who might want, they
16 might want the program. Does that make sense?
17 I mean, if you were a person in the business,
18 wouldn't you think that would make sense to
19 you? Aside from any discrimination now.

20 MR. SCHMIDT: But that is
21 discrimination.

22 JUDGE SIPPEL: No, no. There

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1 hasn't even been a Tennis Channel arrive yet
2 on the scene. They are not born.

3 MR. SCHMIDT: But discrimination
4 looks at whether you apply a different
5 standard to your channels than you do to the
6 channels you don't own. And what Congress was
7 concerned about when it passed Section 616,
8 was exactly that motive that Your Honor just
9 talked about. That if a company like Comcast
10 owns cable and it owns networks, it is going
11 to have its cable company do things that
12 aren't good for the cable company because it
13 helps the overall enterprise. That is
14 anticompetitive.

15 For Comcast Cable to say even
16 though it may not be worth it to us as a cable
17 entity to give broader carriage to Versus and
18 Golf Channel, and we know that is the case
19 from the facts in this case because with
20 versus there was no test Versus had to pass to
21 get broad coverage, even when it started out.
22 We know over the history of Versus that it

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1 struggled as a channel. Mr. Shell talked
2 about how it was dead in the water until a few
3 years ago when they completely redid the
4 channel, changed its name, changed its
5 programming, changed its lineup, got it
6 hockey, moved away from Outdoor Life Network,
7 which is what it was before, rebranded it.

8 At no point did they say, did
9 Comcast cable company say is this worth the
10 carriage we are giving it. They did it for
11 exactly the reasons Your Honor is suggesting,
12 that they knew it would help the overall
13 enterprise if they could say to the
14 marketplace, we give our channels broad
15 carriage, you should give them broad carriage,
16 too. That is the anticompetitive motive that
17 Congress was concerned about when it passed
18 Section 616, not just that they would disfavor
19 channels they didn't own but that they would
20 have this powerful incentive to favor the
21 channels that they did own and that they would
22 reshape the competitive marketplace.

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1 JUDGE SIPPEL: I thought that that
2 was thought of as being smart business by the
3 Wharton School and all those people. No?

4 MR. SCHMIDT: No. There are a lot
5 of anticompetitive practices that may be smart
6 business but --

7 JUDGE SIPPEL: I know but in my
8 hypothetical now, again Tennis Channel isn't
9 born. So there is no entity that is
10 complaining about being discriminated against.
11 You are not born yet. And they say if you
12 just, well I'm not going to repeat what I said
13 but you know, they set up that scenario. And
14 they said we can. And the reason that, the
15 business reason is that they want broader
16 coverage. That is all. They don't want to
17 hurt anybody. They don't want to keep anybody
18 out. They don't want to do anything like that
19 yet, maybe. You haven't sued yet. But I am
20 saying that they don't. I mean, at that point
21 it is irrelevant. What is wrong with it?

22 MR. SCHMIDT: There is something

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